Sexual Assault Benchbook

September-December 2009 Updates

Updates have been issued for the Sexual Assault Benchbook. A summary of each update appears below. The updates have been integrated into the website version of the benchbook; consequently, some of the page numbers may have changed. Clicking on the links below will take you to the page(s) in the benchbook where the updates appear. The text added or changed in each update is underlined.

Chapter 2: The Criminal Sexual Conduct Act

2.2 Terms Used in the CSC Act

In *People v Garland*, 286 Mich App 1, 7 (2009), the Court of Appeals held that *People v Johnson*, 406 Mich 320 (1979), "only appl[ies] in cases where there are multiple punishments under *one* statute for a single act of penetration." In *Garland*, *supra* at 6, "[the defendant] was charged with and convicted of two separate offenses under separate statutes, CSC I and CSC III, for each act of penetration"; therefore, *Johnson* did not apply.

In *People v Waclawski*, ___ Mich App ___, ___ (2009), the Court of Appeals concluded that the definition of "fellatio" (requiring entry of a penis into another person's mouth) as adopted by *People v Reid*, 233 Mich App 457 (1999), was contrary to the plain language of MCL 750.520a(r), which does not define fellatio. However, the *Waclawski* Court was bound by *Reid*, *supra*, under MCR 7.215(J)(1), but declined to call for a conflict resolution panel because doing so was unnecessary to the disposition of the case.

Chapter 7: General Evidence

7.6 Former Testimony of Unavailable Witness

In *People v Garland*, 286 Mich App 1, 11 (2009), the statements made by a sexual abuse victim to a Sexual Assault Nurse Examiner (SANE) were held to be nontestimonial because "under the totality of the circumstances of the [victim's] statements, an objective witness would reasonably believe that the statements made to the nurse objectively indicated that the primary purpose of the questions or the examination was to meet an ongoing emergency[,]" and because "the circumstances did not reasonably indicate to the victim that her statements to the nurse would later be used in a prosecutorial manner against [the] defendant."

Chapter 10: Other Remedies for Victims of Sexual Assault

10.5(B) Damages and Remedies

The amount of court-ordered restitution may not be reduced by the amount of an unpaid civil judgment obtained by the victim against the defendant. *People v Dimoski*, ___ Mich App ___, ___ (2009).

Chapter 11: Sex Offender Identification and Profiling Systems

11.2(H) Sex Offenders Registration Act

People v Dipiazza, ___ Mich App ___, ___ (2009), called into question the continuing validity of *In re Ayres*, 239 Mich App 8 (1999) ("*Ayres* was decided under SORA [Sex Offenders Registration Act] as first enacted, when public access to registration data was foreclosed. The essential underpinning of the conclusion in *Ayres* that the registration requirement imposed by the SORA does not punish was the fact that strict statutory guidelines protected the confidentiality of registration data concerning juvenile sex offenders. This premise is no longer valid, however, as the creation of the PSOR [public sex offender registry] in 1999 eliminated the confidential nature of the sex offender registry").

11.2(M) Sex Offenders Registration Act

People v Dipiazza, ___ Mich App ___, ___ (2009), called into question the continuing validity of *In re Ayres*, 239 Mich App 8 (1999) ("*Ayres* was decided under SORA [Sex Offenders Registration Act] as first enacted, when public access to registration data was foreclosed. The essential underpinning of the conclusion in *Ayres* that the registration requirement imposed by the SORA does not punish was the fact that strict statutory guidelines protected the confidentiality of registration data concerning juvenile sex offenders. This premise is no longer valid, however, as the creation of the PSOR [public sex offender registry] in 1999 eliminated the confidential nature of the sex offender registry"). The *Dipiazza* Court also discussed *Doe v Kelley*, 961 F Supp 1105, 1109 (WD Mich, 1997), and *Lanni v Engler*, 994 F Supp 849, 853 (ED Mich, 1998), which "indicated that the [Sex Offender Registration Act] did not impose a requirement on the registered offender, inflict suffering, disability or restraint." The *Dipiazza* Court noted the Michigan Supreme Court's recognition that "there is a social stigma attached to convictions themselves[,]" and recognized that a stigma may be classified as a disability. *Dipiazza*, *supra* at ___.

The propriety of requiring individuals placed on HYTA status before October 1, 2004, for having a consensual Romeo and Juliet relationship to register as sex offenders after being discharged from youthful trainee status was called into question in *People v Dipiazza*, ___ Mich App ___, ___ (2009). In *Dipiazza*, the defendant was required to register as a sex offender even though he was discharged from HYTA status without a conviction and had been assigned to HYTA status only two months before the statutory amendment was enacted that would have negated the requirement that he register. *Dipiazza*, *supra* at ___. Although the Legislature did not intend SORA to be a punishment, the *Dipiazza* Court concluded that under the totality of circumstances present in the case, requiring the defendant to register as a sex offender did in fact constitute a cruel and unusual punishment and vacated the trial court's order that he comply with SORA. *Id.* at ___. Some of the circumstances the Court considered in making its determination included: SORA registration in this case labeled the defendant as dangerous when he was not a predator or a threat to the public; requiring registration accessible by the public frustrated HYTA's basic premise that a youthful trainee's record not be available for public inspection; and the circumstances of the offense were not very serious but the penalty was harsh.

Previous updates issued since the April 2009 CD was released:

May-August 2009 Updates

Chapter 5: Bond and Discovery

5,14(B) Discovery in Sexual Assault Cases

A witness's informal and mutual agreement with law enforcement officials and the prosecution (that charges against the witness would be reduced in exchange for his testimony against the defendant) constituted evidence favorable to the defendant because of its impeachment value and should have been disclosed under *Brady v Maryland*, 373 US 83 (1963). *Akrawi v Booker*, 572 F3d 252, 263-264 (CA 6, 2009).

Chapter 6: Specialized Procedures Governing Preliminary Examinations and Trials

6.7(F) Special Protections For Victims and Witnesses While Testifying

"[T]o determine whether a trial court infringes a defendant's right of confrontation when it allows witness testimony to be taken through two-way, interactive video technology[,] [t]he trial court must hear evidence and make case-specific findings that the procedure is necessary to further a public policy or state interest important enough to outweigh the defendant's constitutional right of confrontation and that it preserves all the other elements of the Confrontation Clause." *People v Buie*, 285 Mich App 401, 415 (2009).

Chapter 7: General Evidence

7.6 Former Testimony of Unavailable Witness

The admission of a nontestifying DNA analyst's laboratory reports violated the defendant's Sixth Amendment right to confrontation absent a showing that the DNA analyst was unavailable to testify and that the defendant had a prior opportunity for cross-examination. *People v Payne*, 285 Mich App 181, 198-199 (2009).

"[I]n order to determine whether a sexual abuse victim's statements to a SANE (Sexual Assault Nurse Examiner) are testimonial, the reviewing court must consider the totality of the circumstances of the victim's statements and decide whether the circumstances objectively indicated that the statements would be available for use in a later prosecution or that the primary purpose of the SANE's questioning was to establish past events potentially relevant to a later prosecution rather than to meet an ongoing emergency." *People v Spangler*, 285 Mich App 136, 154 (2009).

A gunshot victim's responses to police questioning 30 minutes after, and six blocks away from, the shooting regarding "what had happened, who had shot him, and where the shooting had

occurred[,]" constituted testimonial hearsay because "the „primary purpose' of the questions asked, and the answers given, was to enable the police to identify, locate, and apprehend the perpetrator[,]" as opposed to "enable police assistance to meet an „ongoing emergency.'" *People v Bryant*, 483 Mich 132, 143 (2009).

7.13 Polygraphs

"[G]enerally, a court may neither solicit nor consider polygraph-examination results for sentencing, *People v Towns*, 69 Mich App 475, 478 (1976), and the consideration of polygraph results is generally considered error that requires resentencing, *People v Allen*, 49 Mich App 148, 151-152 (1973)." (Parallel citations omitted.) *People v Anderson*, 284 Mich App 11, 16 (2009).

Chapter 8: Scientific Evidence

8.7 Sexual Assault Evidence Collection Kits and SANEs

A note has been added to see Section 7.6 for information regarding whether statements made by a victim to a Sexual Assault Nurse Examiner (SANE) constitute testimonial evidence for purposes of the Confrontation Clause of the Sixth Amendment.

Chapter 9: Post-Conviction and Sentencing Matters

9.6 Post-Conviction Request for DNA Testing

A defendant does not have a constitutional due process right to postconviction access to the State's evidence for DNA testing. *Dist Attorney's Office for the Third Judicial Dist et al. v Osborne*, 557 US ___, ___ (2009).

Chapter 11: Sex Offender Identification and Profiling Systems

11.2(A)(2) Sex Offenders Registration Act

Aggravated assault, MCL 750.81a, constituted a listed offense under MCL 28.722(e)(*xi*), where the defendant assaulted the seven-year-old victim by touching her underneath her underwear on numerous occasions. *People v Anderson*, 284 Mich App 11, 14-15 (2009).

People v Golba, 273 Mich App 603 (2007), and *People v Althoff (On Remand)*, 280 Mich App 524 (2008), are binding. *People v Anderson*, 284 Mich App 11, 13 (2009).

11.4 DNA Identification Profiling System

2008 PA 380, effective July 1, 2009, amended MCL 750.520m to require that an individual arrested for a violent felony as described in MCL 791.236 provide a DNA sample under the statute. The amendment also provides that a DNA sample taken under MCL 750.520m(1)(a) (individual arrested for a violent felony as defined in MCL 791.236) may be transmitted to the Department of State Police upon collection.